

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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| In the Matter of the Petitions | : | |
| of | : | |
| DRUG STORE, INC., | : | DETERMINATION |
| ANTOINETTE PELUSO | : | DTA NOS. 822066, 822067 |
| AND NICHOLAS AVICOLLI | : | AND 822068 |
| for Revision of Determinations or Refund of Sales and | : | |
| Use Taxes under Articles 28 and 29 of the Tax Law for | : | |
| the Period March 1, 2002 through February 28, 2005. | : | |

Petitioners, Drug Store, Inc., Antoinette Peluso and Nicholas Avicolti, filed petitions for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period June 1, 2002 through May 31, 2005.

On August 8, 2008, the Division of Taxation, by its representative, Daniel Smirlock, Esq. (John E. Matthews, Esq., of counsel), filed three motions seeking the dismissal of the petitions or, in the alternative, summary determination pursuant to 20 NYCRR 3000.5, 3000.9(a)(1) and 3000.9(b). Accompanying the motions were affidavits of John E. Matthews and annexed exhibits supporting the motion. Petitioners, appearing pro se, responded by letter with photographs filed on behalf of all petitioners on November 8, 2008, the date which commenced the 90-day period for the issuance of this determination. After due consideration of the submissions by the Division of Taxation and petitioner, Joseph W. Pinto, Jr., Administrative Law Judge, renders the following determination.

ISSUE

Whether the Division of Tax Appeals has jurisdiction to consider the issues raised in the petition.

FINDINGS OF FACT

1. The Division of Taxation (Division) issued to petitioner Drug Store, Inc., a Notice of Determination, assessment number L-028172589, asserting a sales tax deficiency of \$145,398.23 plus penalty and interest for the period March 1, 2002 through February 28, 2005. Petitioner protested this notice by timely filing a Request for Conciliation Conference with the Division's Bureau of Conciliation and Mediation Services (BCMS).

2. A conference was scheduled but Drug Store, Inc., did not appear and a Conciliation Default Order was issued, dated September 28, 2007. The order was mailed to Drug Store, Inc., at its last known address of record: "Antoinette Peluso, 662 Foothill Road, Bridgewater, NJ 08807-1848" found on its 2005 Annual Sales and Use Tax Return.

3. The Division of Taxation issued to petitioner Antoinette Peluso a Notice of Determination, assessment number L-028211652, asserting a sales tax deficiency of \$57,649.05 plus penalty and interest for the period December 1, 2003 through February 28, 2005. Petitioner protested this notice by timely filing a Request for Conciliation Conference with BCMS.

4. A conference was scheduled but Antoinette Peluso did not appear and a Conciliation Default Order was issued, dated September 28, 2007. The order was mailed to Antoinette Peluso at her last known address of record: "Antoinette Peluso, 662 Foothill Road, Bridgewater, NJ 08807-1848" found on her 2005 New York State Nonresident Income Tax Return.

5. The Division of Taxation (Division) issued to petitioner Nicholas Avicolli a Notice of Determination, assessment number L-028211651, for the period December 1, 2003 through

February 28, 2005. Petitioner protested this notice by timely filing a Request for Conciliation Conference with BCMS.

6. A conference was scheduled but Nicholas Avicolti did not appear and a Conciliation Default Order was issued, dated September 28, 2007. The order was mailed to Nicholas Avicolti at his last known address of record: "Nicholas Avicolti, 668 Foothill Road, Bridgewater, NJ 08807-1848" found on his Request for Conciliation Conference in BCMS, dated February 15, 2007.

7. For all three of the petitioners herein, the Division of Taxation (Division) submitted the affidavits of James Steven VanDerZee and Robert Farrelly, both employees of the Division. The affidavit of Robert Farrelly, Assistant Supervisor of Tax Conferences for BCMS, set forth the Division's general procedure for preparing and mailing conciliation orders. This procedure culminated in the mailing of the orders by the United States Postal Service (USPS), via certified mail, and confirmation of such mailing through receipt by BCMS of a postmarked copy of the Certified Record for Presort Mail, or CMR.

8. The BCMS Data Management Services Unit prepared and forwarded the conciliation orders and the accompanying cover letters, predated with the intended date of mailing, to the conciliation conferee for signature. The conciliation conferee, in turn, signed and forwarded the order and covering letter to a BCMS clerk assigned to process the conciliation orders.

9. The name, mailing address, order date and BCMS number for each Conciliation Order to be issued were electronically sent to the Division's Advanced Function Printing Unit (AFP Unit). For each mailing, the AFP Unit assigned a certified control number and produced a cover sheet that indicated the BCMS return address, date of mailing, the taxpayer's name, mailing address, BCMS number, certified control number, and certified control number bar code.

10. The AFP Unit also produced a computer-generated CMR entitled “Assessments Receivable, Certified Record for Presort Mail.” The CMR was a listing of taxpayers and representatives to whom conciliation orders were sent by certified mail on a particular day. The certified control numbers and the BCMS numbers were recorded on the CMR. The AFP Unit printed the CMR and cover sheets and delivered them to the BCMS clerk assigned to process conciliation orders.

11. The clerk, as part of her regular duties, associated each cover sheet, conciliation order, and covering letter. The clerk verified the names and addresses of taxpayers with the information listed on the CMR and on the cover sheet. The clerk then folded and placed the cover sheet, covering letter, and Conciliation Order into a three-windowed envelope.

12. It was the general office practice that the BCMS clerk stamped “Post Office Hand write total # of pieces and initial. Do Not stamp over written areas,” and also stamped “Mailroom: Return Listing To: BCMS Bldg 9 Rm 180 Att: Conference Unit” on the last page of the CMR.

13. The BCMS clerk also wrote the date of mailing of the conciliation orders listed on the CMR at the top of each page of the CMR. In this case “9/28/07” was written in the upper right corner of each page of the CMR.¹

14. The CMR, along with the envelopes containing the cover sheets, covering letters, and conciliation orders were picked up in BCMS by an employee of the Division’s Mail Processing Center.

¹Although the Division of Taxation submitted three separate motions and each contained a CMR for each petitioner, the same CMR was submitted for each matter. Therefore, all references to the preparation and mailing of the CMR by Mr. Farrelly and Mr. VanDerZee refer to one and the same document and are equally pertinent to each petitioner.

15. The CMR contained a list of the 50 conciliation orders issued by the Division on September 28, 2007. The CMR listed 53 certified control numbers with three deletions from the list. Each such certified control number was assigned to an item of mail listed on the five pages of the CMR. Specifically, corresponding to each listed certified control number was a reference number, the name and address of the addressee, and postage and fee amounts. Each page of the CMR contained the postmark affixed by the United States Postal Service with the date September 28, 2007.

16. Information regarding the Conciliation Order issued to Drug Store, Inc., was contained on page one of the CMR. Corresponding to certified control number 7104 1002 9730 0326 3583 was reference number 000217988, along with petitioner's name and address: Drug Store, Inc., Attn: Antoinette Peluso, 662 Foothill Road, Bridgewater, NJ 08807-1848. The CMR contained a notation that the certified mail was "unclaimed" and then "remailed" on November 2, 2007 by regular mail, the BCMS policy when orders are returned by the Postal Service.

17. Information regarding the Conciliation Order issued to Antoinette Peluso was contained on page one of the CMR. Corresponding to certified control number 7104 1002 9730 0326 3606 was reference number 000217990, along with petitioner's name and address: Antoinette Peluso, 662 Foothill Road, Bridgewater, NJ 08807-1848. The CMR contained a notation that the certified mail was "unclaimed" and then "remailed" on November 2, 2007 by regular mail, the BCMS policy when orders are returned by the Postal Service.

18. Information regarding the Conciliation Order issued to Nicholas Avicolti was contained on page one of the CMR. Corresponding to certified control number 7104 1002 9730 0326 3590 was reference number 000217989, along with petitioner's name and address: Nicholas Avicolti, 668 Foothill Road, Bridgewater, NJ 08807-1848. The CMR contained a

notation that the certified mail was “unclaimed” and then “remailed” on November 2, 2007 by regular mail, the BCMS policy when orders are returned by the Postal Service.

19. The affidavit of James Steven VanDerZee, Mail and Supply Supervisor in the Registry Unit of the Division’s Mail Processing Center, attested to the regular procedures followed by his staff in the ordinary course of business of delivering outgoing mail to branch offices of the USPS. He stated that after a Conciliation Order was placed in the “Outgoing Certified Mail” basket in the Mail Processing Center, a member of the staff weighed and sealed each envelope and affixed postage and fee amounts. A clerk then counted the envelopes and verified the names and certified mail numbers against the information contained on the CMR. Thereafter, a member of the staff delivered the stamped envelopes to a branch of the USPS in Albany, New York. A postal employee affixed a postmark and his or her initials or signature to the CMR indicating receipt by the post office.

20. Here the postal employee affixed a postmark dated September 28, 2007 to each page of the five-page CMR. The postal employee also wrote his or her initials and the number “50” next to the printed statement “TOTAL PIECES RECEIVED AT POST OFFICE” on page five of the CMR, in compliance with the Division’s specific request that postal employees either circle the number of pieces of mail received or write the number of pieces received on the mail record, indicating that 50 pieces of mail were actually received.

21. The CMR is the Division’s record of receipt by the USPS for pieces of certified mail. In the ordinary course of business and pursuant to the practices and procedures of the Division’s Mail Processing Center, the CMR was picked up at the post office by a member of Mr. VanDerZee’s staff on the following day after its initial delivery and was then delivered to the

originating office, in this case BCMS. The CMR was maintained by BCMS in the regular course of business.

22. Based upon his review of the affidavits of Robert Farrelly submitted for each of the matters herein and the exhibits attached thereto, including the CMR, Mr. VanDerZee stated that on September 28, 2007, an employee of the Mail Processing Center delivered a piece of certified mail to a branch of the USPS in Albany, New York in a sealed postpaid envelope for delivery by certified mail addressed to: Drug Store, Inc., Attn: Antoinette Peluso, 662 Foothill Road, Bridgewater, NJ 08807-1848; Antoinette Peluso, 662 Foothill Road, Bridgewater, NJ 08807-1848; and Nicholas Avicolti, 668 Foothill Road, Bridgewater, NJ 08807-1848. He stated that he could also determine that a member of his staff obtained a copy of the CMR delivered to and accepted by the post office on September 28, 2007 for the records of BCMS. Mr. VanDerZee asserted that the procedures described in his affidavits submitted for each of the petitioners herein were the regular procedures followed by the Mail Processing Center in the ordinary course of business when handling items to be sent by certified mail, and that these procedures were followed in mailing the pieces of certified mail to Drug Store, Inc. on September 28, 2007.

CONCLUSIONS OF LAW

A. There is a 90-day statutory time limit for filing a petition for a hearing with the Division of Tax Appeals following the issuance of a conciliation order (Tax Law § 170[3-a][e]; 20 NYCRR 4000.5[c][4]). Pursuant to Tax Law § 170(3-a)(e) and Tax Law § 689(b), the conciliation orders and underlying assessments in this case would be binding upon petitioners unless they filed timely petitions with the Division of Tax Appeals. The Division of Tax Appeals lacks jurisdiction to consider the merits of a petition filed beyond the 90-day time limit (*see Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

B. Where the timeliness of a taxpayer's petition following a conciliation order is in question, the initial inquiry focuses on the mailing of the conciliation order because a properly mailed conciliation order creates a presumption that such document was delivered in the normal course of the mail (*see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). However, the "presumption of delivery" does not arise unless or until sufficient evidence of mailing has been produced and the burden of demonstrating proper mailing rests with the Division (*Matter of Novar TV & Air Conditioning Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991). When an order is found to have been properly mailed by the Division to his last known address by certified or registered mail, the petitioner in turn bears the burden of proving that a timely protest was filed (*Matter of Malpica*, Tax Appeals Tribunal, July 19, 1990). However, the burden of demonstrating proper mailing in the first instance rests with the Division (*Matter of Ruggerite, Inc. v. State Tax Commission*, 97 AD2d 634, 468 NYS2d 945 [1983], *affd* 64 NY2d 688, 485 NYS2d 517 [1984]).

C. The evidence required of the Division in order to establish proper mailing is two-fold: first, there must be proof of a standard procedure used by the Division for the issuance of orders by one with knowledge of the relevant procedures; and, second, there must be proof that the standard procedure was followed in this particular instance (*see Matter of Katz*,; *Matter of Novar TV & Air Conditioning Sales & Serv.*). In this case, the Division has met its burden of establishing proper mailing. Specifically, BCMS was required to mail the conciliation orders to petitioners at their last known address (*see Matter of Wilson*, Tax Appeals Tribunal, July 13, 1989). As indicated by the CMR and the affidavits of James Steven VanDerZee and Robert Farrelly, Division employees involved in and possessing knowledge of the process of generating, reviewing and issuing (mailing) conciliation orders, the Division has offered adequate proof to

establish the fact that the conciliation orders in issue were actually mailed to petitioners by certified mail on September 28, 2007, the date appearing on the CMR, to their last known addresses of record. The affidavits described the various stages of producing and mailing orders and attested to the authenticity and accuracy of the copies of the order and the CMR submitted as evidence of actual mailing. These documents established that the general mailing procedures described in the VanDerZee and Farrelly affidavits were followed with respect to the conciliation orders issued to petitioners. Petitioners' names and addresses, as well as the numerical information on the face of the orders, appear on the CMR which bears a USPS date stamp of September 28, 2007. There were 50 certified mail control numbers listed on the CMR, and the USPS employee who initialed the CMR indicated, by writing the number "50" near his initials, that he received 50 items for mailing. In short, the Division established that it mailed the Conciliation Orders to petitioners by certified mail on September 28, 2007 (*see Matter of Auto Parts Center*, Tax Appeals Tribunal, February 9, 1995).

D. An order is issued when it is properly mailed, and it is properly mailed when it is delivered into the custody of the USPS, as described above (*Matter of Air Flex Custom Furniture*, Tax Appeals Tribunal, November 25, 1992). In the instant matters, the conciliation orders were properly mailed when they were delivered into the custody of the USPS on September 28, 2007, and it is this date which commenced the 90-day period within which a protest had to have been filed. Ninety days after the September 28, 2007 date of mailing was December 27, 2007, and in order to be considered timely, petitioners' protests had to have been filed on or before such date. Petitioners' protest was not filed until January 7, 2008 and was therefore untimely.

E. Petitioners have not denied that the petition was untimely, even stating in their response to the motion that their “original petition was filed and stamped by the Department of Taxation January 9, 2008.” In fact, the original petition was filed with the Division of Tax Appeals on January 7, 2008 and received on January 9, 2008, both of which dates were beyond the 90-day time limit. Further, petitioners have offered neither argument nor proof disputing the evidence introduced by the Division of Taxation on these motions.

Instead, petitioners’ arguments on this motion focus on the underlying assessments and seek an adjustment to the tax asserted in the notices based on the size and scope of petitioners’ business operation. Unfortunately, since the petitions were filed beyond the 90-day time limit, the Division of Tax Appeals lacks jurisdiction to consider the merits of the case.

F. A motion for summary determination shall be granted:

if, upon all papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party (20 NYCRR 3000.9[b][1]).

Since the Division has established that it mailed the conciliation orders to petitioners by certified mail on September 28, 2007, and petitioners have not raised any arguments or submitted any evidence in opposition, there is no material or triable issue of fact presented and, as a matter of law, summary determination for the Division is proper.

G. The Division of Taxation’s Motion for Summary Determination is granted, and the petitions of Drug Store, Inc., Antoinette Peluso and Nicholas Avicolti are dismissed.

DATED: Troy, New York
February 5, 2009

/s/ Joseph W. Pinto, Jr.
ADMINISTRATIVE LAW JUDGE